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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 610

ANGELUS MILLING COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW.

The opinion of The Tax Court of the United States (R. 91–97) is reported in 1 T. C. 1031. The opinion of the Circuit Court of Appeals (R. 133–139) is reported in 144 F. 2d 469.

JURISDICTION

The judgment of the Circuit Court of Appeals, affirming that of the Tax Court, was entered on July 24, 1944 (R. 139). The petition for a writ of certiorari was filed on October 18, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Tax Court erred in dismissing the proceeding for lack of jurisdiction where the petitioner's claims for refund of processing taxes failed to comply with the requirements of Section 903 of the Revenue Act of 1936, as amended, and applicable Treasury Regulations promulgated thereunder or the information called for on Form P. T. 79, and such defects had not been waived by the Commissioner of Internal Revenue.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory and regulatory provisions are printed in the Appendix, *infra*, pp. 18–30.

STATEMENT

This proceeding involves a claim for refund of $145,839.12, alleged to have been paid as processing tax under the Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended, upon the first domestic processing of wheat (R. 91). The proceeding was first instituted before the Processing Tax Board of Review by a petition filed on August 20, 1941 (R. 7–41), to review the Commissioner's disallowance of the petitioner's claim for refund of that amount.[1] An amendment to the

[1] The Processing Tax Board of Review was abolished by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and its jurisdiction and functions were transferred to the Board of Tax Appeals, the name of which was in turn changed to that of The Tax Court of the United States by Section 504 (a) of the Revenue Act of 1942.

original petition was filed with the Board of Review on November 21, 1941 (R. 49–53), and on December 29, 1941, an amended petition was filed with the Board (R. 63–70). The Commissioner of Internal Revenue thereupon moved to dismiss the proceeding on jurisdictional grounds (R. 72–76, 78–79). The Commissioner's motion was denied by an order entered August 5, 1942, one member dissenting, and the Commissioner was granted leave to file an answer (R. 80–81).

The Commissioner's answer was filed with the Board of Review on August 21, 1942, and in his answer he alleged as an affirmative defense the jurisdictional grounds upon which his motion to dismiss had been based (R. 82–85).

After the Board of Review was abolished, this proceeding was transferred to The Tax Court of the United States and on January 29, 1943, the Commissioner filed with the Tax Court a new motion to dismiss on jurisdictional grounds (R. 86–90). The first ground of this motion to dismiss was, in substance, that the so-called "Amendment to Claim" attached as Exhibit C (R. 30–39) to the original petition filed with the Board of Review, which constitutes the purported claim on which the action was based, was insufficient in law to constitute a basis for such action (R. 86–89). The second ground of the motion to dismiss was that there were no evidentiary facts submitted in connection with the so-called claim from which the Commissioner could have legally de-

termined that the petitioner either paid any amount as processing tax or that it bore the burden of any amount so paid (R. 90).

In an opinion promulgated May 4, 1943 (R. 91–97), the Tax Court held that it had no jurisdiction where the claims for refund of processing taxes failed to set forth any of the information called for by the law, the regulations, and Form P. T. 79, and that such defects had not been waived by the Commissioner of Internal Revenue. An order of dismissal was entered (R. 98).

The record discloses that the Commissioner on May 23, 1941, rejected the petitioner's claim on the ground that it had not paid any amount to the Government as processing tax and on the further ground that the petitioner had not filed a valid and complete refund claim as required by Title VII of the Revenue Act of 1936 and the Treasury Regulations promulgated thereunder (R. 40–41). In appealing to the Board of Review, the petitioner alleged in its original petition that during the period of July 9, 1933, to January 6, 1936, inclusive, it was "a processor of, and processed, wheat under the name of Middleport Flour Mills, Inc., now Angelus Milling Company;" that during this period it "paid, or had paid for its account out of its own monies" processing taxes in the sum of $145,839.12. Then follows the allegation that on or about January 29, 1936, claims were filed on Form 843 by

"Niagara Falls Milling Co., Inc., and/or Middleport Flour Mills, Inc.,"[2] for the refund of processing taxes in the total sum of $454,045.27.[3] Copies of these claims, Exhibits A–1, A–2 and A–3 (R. 11–19), unsigned, were attached to the original petition filed with the Board. (R. 7.) Each of these claims contains a statement of the amount alleged to have been paid to the Collector of Internal Revenue at Buffalo, New York, as taxes upon the processing of wheat for the respective periods covered by the several claims. These statements indicate that payment of the full amount involved for each period was made by Niagara Falls Milling Company, Inc., Lockport, New York. There is nothing in any of the claims to indicate that any part of the processing tax in question was paid by petitioner. They were filed on Form 843 rather than on Form P. T. 79 which is required by Article 601 of Treasury Regulations 96, Appendix, *infra*, p. 27. (R. 13, 16, 19.)

In its original petition (R. 7–8), and in its amended petition (R. 65), the petitioner alleges that on June 30, 1937, after enactment of the Revenue Act of 1936, Niagara Falls Milling Company, Inc., filed a claim for refund of processing tax in the sum of $436,231.73 "paid on account of the processing of wheat by it and by Petitioner" (R. 65). A copy of this claim, Exhibit

[2] Apparently the name of Middleport Flour Mills, Inc., was changed to Angelus Milling Company (R. 49, 63, 69).

[3] Similar allegations are made in the amended petition filed with the Board (R. 65–67).

B (R. 20–29), unsigned, was attached to the original petition filed with the Board. That claim indicates payment of only $436,231.73 as processing tax, and indicates that it all was paid by Niagara Falls Milling Company, Inc. (R. 24–25, 27). It does not purport to be a claim by or on behalf of the petitioner for any amount and does not indicate that any part of the amount claimed had been paid by petitioner.

In its original petition (R. 8) and in its amended petition (R. 65), the petitioner alleges that on or about August 15, 1938, it filed a claim for refund of $145,839.12 "paid out of its monies" on account of the processing of wheat by it, designating this claim as "Amendment to Claim". A copy of this so-called "Amendment to Claim", Exhibit C (R. 30–39), was attached to the original petition filed with the Board.

This so-called refund claim contained no information whatever other than a schedule (R. 32) purporting to show the total number of barrels of flour produced by both companies, the gross sales value thereof, a total processing tax computed thereon of $434,045.27, and an allocation attributing $145,839.12 of this amount to flour produced by the petitioner. In addition, the following sworn statement of allocation of liability was attached to the claim (R. 33):[4]

[4] A different allocation of this liability is set forth in allegations contained in the amendment to its original petition which the petitioner filed on November 21, 1941 (R. 49–53), and in its amended petition (R. 64–65).

The within claim for refund was originally filed on the 22nd day of June 1936 in the name of the Niagara Falls Milling Company and/or Middleport Flour Mills, Inc. The name of Middleport Flour Mills Inc. was changed by permission of the Secretary of State at Albany, N. Y. to Middleport Flour Mills Inc. Originally the claim in the name of both Companies was for the sum of $434,045.27.

The amount to be allocated to the Angelus Milling Company is $145,839.12 and the amount to be allocated to the Niagara Falls Milling Company is $288,206.15.

Since the filing of said claim, the Niagara Falls Milling Company was adjudicated a bankrupt on the 21st day of March, 1938. Since said date the claim of the Niagara Falls Milling Company, Inc. and the Angelus Milling Company, Inc. was handled by the same personnel, both companies having had the same officers and approximately the same directors. The Angelus Milling Company, Inc. at the present time is not bankrupt and this amended claim is presented solely on behalf of the Angelus Milling Company, Inc. and request is hereby made that the amount of refund due the Angelus Milling Company, Inc. be determined and paid to it as a separate entity and that said claim be not commingled with the claim of the Niagara Falls Milling Company. The within claim has been prepared from certain records of the two companies and is

based on data as shown by the attached Schedule A.

In addition to the foregoing allegations, the petitioner alleges in its amended petition (R. 63–67) that for the period June 9, 1933, to January 31, 1935, inclusive, joint returns on account of the processing of wheat by the petitioner and Niagara Falls Milling Company, Inc., were filed with the Collector and tax in the sum of $324,016.25 was paid on account of such processing, and that for the period February 1, 1935, to November 30, 1935, inclusive, returns on account of the processing of wheat by the petitioner and Niagara Falls Milling Company were filed in the name of Niagara Falls Milling Company and tax in the sum of $110,029.02 was paid on account of such processing (R. 63–64).

After the original petition herein was filed with the Board of Review, the Commissioner filed a "Motion for Better Statement of Claim" (R. 42–46). At a hearing before a member of the Board on this motion, certain documents were offered in evidence, the substance of which is incorporated in the "Statement of Evidence" (R. 109–129). The statement of evidence and the attached documents show that a "Monthly Return of Processor of Wheat, P. T., Form 1," was filed for each of the months from July, 1933, through January, 1935, by "Niagara Falls Milling Co. and Angelus Milling Company, Inc., * * * on account of proc-

essings of wheat * * * in the mill at *Lockport*, New York" (R. 110); that a "Monthly Return of Processor of Wheat, P. T. Form 1," was filed by "Niagara Falls Milling Co.," for each of the months from February, 1935, through November, 1935; "on account of processings of wheat * * * in the mill at *Lockport*, New York" (R. 110–111); that a "Monthly Return of Processor of Wheat, P. T. Form 1," was filed by "Niagara Falls Milling Co.," on account of wheat processed "in the mill at *Middleport*, New York," for each of the months from February, 1935, through November 1935 (R. 111); and that a letter (R. 125) was sent to Harry Dickson, president of both corporations by the General Deputy Collector at Buffalo, New York, requesting permission to examine the general ledgers of both corporations for the years 1935 and 1936 (*id.*). The affidavits of two certified public accountants were also offered in evidence (R. 111–112, 126–129).

The Circuit Court of Appeals affirmed the decision of the Tax Court that the claims for refund did not meet the requirements of the statute and applicable Treasury Regulations promulgated pursuant thereto. It held too that the Commissioner had not waived the inherent defects in the claims as filed. (R. 133–139.)

ARGUMENT

This action was brought under Title VII of the Revenue Act of 1936 for the refund of amounts

alleged to have been paid as processing tax under the Agricultural Adjustment Act, the taxing provisions of which were held later to be unconstitutional: *United States* v. *Butler*, 297 U. S. 1.

The remedy provided by Title VII for the recovery of such taxes is exclusive. As a condition to the allowance of a refund of such taxes the claimant is required to file a claim for refund in accordance with provisions of the statute and Treasury Regulations prescribed thereunder by the Commissioner of Internal Revenue. Section 903 (Appendix, *infra*, pp. 19-20) Treasury Regulations 96, pursuant to the authority granted by the statute, prescribe the form, P. F. Form 79, on which a claim for refund must be made and specify the facts, figures, and other data which must be submitted as a part thereof. Article 601 (Appendix, *infra*, p. 27). The claim must state the grounds for refund with supporting evidence, under oath, and must show that the claimant bore the burden of the tax and did not shift it to others. Section 902 (Appendix, *infra*, pp. 18–19); Articles 202, 204, 606 (Appendix, *infra*, pp. 26–27, 30). In case of claims for refund of amounts paid as processing taxes, the claimant is further required to submit evidence as to his average margin, as defined in the statute (Section 907, Appendix, *infra*, pp. 20–25) for the tax period in question (Article 605, Appendix, *infra*, pp. 28–30).

In the instant case, the so-called claims, Exhibits A–1, A–2 and A–3 (R. 11–19), filed in the name of Niagara Falls Milling Company, Inc., and/or Middleport Flour Mills, Inc., on Form 843 rather than on the proper form, P. T. 79, and the "Amendment to Claim", Exhibit C (R. 30–39), filed by the petitioner on P. T. 79, upon which this action is based, do not supply any of the above information. Exhibits A–1, A–2 and A–3 disclose no information except the amount of taxes paid by the Niagara Falls Milling Company, Inc., and the "Amendment to Claim", Exhibit C, merely discloses the amount of taxes paid by the petitioner, as distinguished from Niagara Falls Milling Company, Inc., on the basis of an allocation between them. The Tax Court (R. 93–95) and the Circuit Court of Appeals (R. 138–139) properly held that neither separately nor together do these claims satisfy the requirements of the statute and Treasury Regulations.

The letter of the Commissioner, Exhibit D (R. 40–41), rejected the claim for refund on the ground that the tax, refund of which was sought, was not paid by the petitioner, and that the claim did not contain a computation of the necessary margins nor did it establish that petitioner bore the burden of the tax as required by the law and regulations. The Tax Court found (R. 93) that

the information required to be stated in claims for refund of processing taxes on Form P. T. 79 had not been given.

The claim for the refund of processing taxes must contain a statement of particular information and data which are not necessary in the ordinary claim for refund of other revenue taxes. Thus this case, in essence, resolves itself into the failure of a claimant to meet prescribed requirements in connection with a claim for refund of processing taxes. The question here does not, as contended by the petitioner (Pet. 15–17), present a basic issue of great importance in the administration of the tax laws. The decisions below are based upon failure of the petitioner to present the necessary and required data in support of its claim. In fact, as pointed out by the Circuit Court of Appeals (R. 137), the question has already been resolved against the petitioner by the decision of this Court in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62. That case involved claims for refund of income taxes, as to which the requirements are, if anything, less strict than in the case of processing tax claims.

The petitioner contends that if all the claims for refund are considered together the necessary requirements have been met. But, as pointed out by the Tax Court (R. 95) and by the Circuit Court of Appeals (R. 138–139), the "Amend-

ment to Claim", Exhibit C (R. 30–39), refers expressly (R. 33) to Exhibits A–1, A–2 and A–3 (R. 11–19) which were claims filed in June, 1936, and they in turn did not comply with the necessary requirements. Furthermore, the claim, Exhibit B (R. 20–29), was not a claim for refund of taxes paid by the petitioner but by a different company, the Niagara Falls Milling Company (R. 20). There is no authority which would permit the petitioner to treat the claim filed by the Niagara Company as its own claim for purposes of filing an "Amendment to Claim". And the courts have consistently held that a claim for refund under Title VII of the Revenue Act of 1936 must be filed by the person who was liable for, and who paid the processing tax to the Government.[8] The

[8] *F. & F. Laboratories* v. *Commissioner*, 104 F. 2d 563 (C. C. A. 7th); *Oswald Jaeger Baking Co.* v. *Commissioner*, 108 F. 2d 375 (C. C. A. 7th), certiorari denied, 309 U. S. 683; *Southwestern Serum Co.* v. *Commissioner*, 108 F. 2d 843 (C. C. A. 10th), certiorari denied, 310 U. S. 628; *Arabi Packing Co.* v. *Commissioner*, 109 F. 2d 278 (C. C. A. 5th), certiorari denied, 310 U. S. 645; *Grain Belt Supply Co.* v. *Commissioner*, 109 F. 2d 490 (C. C. A. 8th), certiorari denied, 310 U. S. 648; *Zinsmaster Baking Co.* v. *Commissioner*, 109 F. 2d 738 (C. C. A. 8th), certiorari denied, 310 U. S. 653; *New Consumers Bread Co.* v. *Commissioner*, 115 F. 2d 162 (C. C. A. 3d); *Alexander Smith & Sons C. Co.* v. *Commissioner*, 117 F. 2d 974 (C. C. A. 2d); *Lindner Packing & P. Co.* v. *Commissioner*, 118 F. 2d 656 (C. C. A. 10th); *Albert Miller & Co.* v. *Commissioner*, 120 F. 2d 789 (C. C. A. 7th); *Savannah Sugar R. Corp.* v. *Commissioner*, 121 F. 2d 426 (C. C. A. 5th).

Tax Court found (R. 97, fn. 4) that the claims themselves stated that the taxes were paid by the Niagara Company and not by the petitioner.

Petitioner urges (Pet. 14, 23–24) that any defects in the claims as such were waived by the Commissioner, but the Tax Court held that there had been no waiver of the requirements (R. 96). This is also shown by the letter (R. 40) from the Commissioner rejecting the claim, and the letter (Pet. 11, R. 125) from the General Deputy Collector did not constitute such a waiver (R. 96). That letter requested permission to examine the books in connection with Claim F. 5899, a claim for refund filed by the Niagara Falls Milling Company. The claim of the petitioner was Claim F. 10130 (R. 96). The Circuit Court of Appeals held petitioner's assertion of estoppel to be without merit (R. 135–136, 138).

In the absence of a waiver by the Commissioner, technical requirements in connection with a claim for refund of taxes must be met and the Commissioner has no authority to waive the positive requirements of the statute. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528, 533. The courts are all in agreement that that principle applies to refunds under Title VII of the Revenue Act of 1936. *Lee Wilson & Co.* v. *Commissioner*, 111 F. 2d 313, 317–318 (C. C. A. 8th); *Lee Wilson & Co.* v. *Commissioner*, 123 F. 2d 232, 234–235 (C. C. A. 8th); *Landrum* v. *Commissioner*, 122 F. 2d 857, 859 (C. C. A. 8th); *Tennessee Consolidated*

C. Co. v. *Commissioner*, 117 F. 2d 452, 454 (C. C. A. 6th); *Samara* v. *United States*, 129 F. 2d 594, 597 (C. C. A. 2d), certiorari denied, 317 U. S. 686; *Cudahy Packing Co.* v. *United States*, 126 F. 2d 429 (C. C. A. 7th).

There is no actual conflict of decisions as asserted by the petitioner (Pet. 18–21). None of the cases relied upon involved a refund of processing taxes, and *United States* v. *Humble Oil & Refining Co.*, 69 F. 2d 214 (C. C. A. 5th), merely holds that the Commissioner may waive strict compliance with regulations requiring that all facts relied upon must be stated in the claim for refund. Unlike the instant case, it appears that there the Commissioner had in fact decided the claim on the merits and actually determined the amount of the overpayment in tax. Clearly, no conflict can be based on the Court of Claims decision in *Memphis Cotton Oil Co.* v. *United States*, 59 F. 2d 276 (C. Cls.), which this Court [illegible] (288 U. S. 72, 73) None of the district court cases cited by petitioner (Pet. 20) is in conflict with this case.[6] All deal

[6] *Union Trust Co. of Pittsburgh* v. *McCaughn*, 24 F. 2d 459 (E. D. Pa.), held that the Commissioner could waive any defect or informality in a claim for refund. *Wunderle* v. *McCaughn*, 38 F. 2d 258 (E. D. Pa.), appears to be inconsistent with *Real Estate Title Co.* v. *United States*, 309 U. S. 13, but in any event all facts and circumstances were fully set out in the claim, though the claim was based upon the erroneous legal theory of a deductible bad debt instead of a deduction for business expenses. *Weihman* v. *United States*, 4 F. Supp. 155 (E. D. Pa.), also held that the Commissioner could waive and had waived the insufficiency of the claim.

with situations where there had been a waiver of the insufficiency of the claim or all the facts were before the Commissioner. As was previously stated, the finding in the instant case is that there had been no such waiver (R. 96), and the required information had not been made available.

Contrary to the petitioner's assertion (Pet. 21–22), the decisions below in no way depart from but instead follow the principles laid down by this Court in *Tucker* v. *Alexander*, 275 U. S. 228; *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; and *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73. The first case held the objection that the ground of recovery was not sufficiently specified could be and had been waived by stipulation of the parties. Cf. *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269. The last two cases held that a claim for refund may be timely amended before final rejection by the Commissioner. In the instant case, however, there was no sufficient claim or amendment before rejection. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337 (Pet. 22), recognizes that the provisions of Title VII, prescribing the conditions under which refunds of processing taxes may be secured are constitutional and must be met by a showing that the claimant bore the burden of the tax and did not shift it to others.

CONCLUSION

The decisions below are correct and there is no conflict of decisions. The petition should be denied.

Respectfully submitted.

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NOVEMBER 1944.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

SEC. 901. REPEALS.

Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed. (7 U. S. C., Sec. 623.)

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any com-

modity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C., Sec. 644.)

SEC. 903 [as amended by Section 405, Revenue Act of 1939, c. 247, 53 Stat. 862]. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to January 1, 1940, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Ad-

justment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (7 U. S. C., Sec. 645.)

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during

such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting proce-

dure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to

provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that

the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or col-

lected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others. (7 U. S. C. Sec. 649.)

Revenue Act of 1942, c. 619, 56 Stat. 798:[1]

SEC. 510. ABOLITION OF BOARD OF REVIEW AND TRANSFER OF JURISDICTION TO BOARD OF TAX APPEALS.

(a) Effective as of the close of business on December 31, 1942, the Board of Review, established under section 906 (b) of the Revenue Act of 1936, is hereby abolished and the jurisdiction vested in said Board of Review is hereby transferred to and vested in the Board of Tax Appeals.

* * * * * *

(c) All proceedings pending in the said Board of Review on December 31, 1942, shall be deemed pending in and be trans-

[1] The name of the Board of Tax Appeals was changed by Section 504 of the Revenue Act of 1942 to The Tax Court of the United States.

ferred forthwith to the Board of Tax Appeals, and shall be proceeded with and disposed of by the Board of Tax Appeals as if originally begun therein.

(d) All journals, dockets, books, files, records, and property, including office equipment of the said Board of Review, shall be transferred to the Board of Tax Appeals.

(e) Section 902 of the Revenue Act of 1936 (relating to conditions on allowance of refunds) is amended by striking out "Board of Review" and inserting in lieu thereof "Board of Tax Appeals (hereinafter referred to as the 'Board')".

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(7 U. S. C. Supp. III, Sec. 648.)

Treasury Regulations 96, promulgated under the Revenue Act of 1936:

ARTICLE 201. *Claims—Form and where to file.*—Claims for the refund of tax shall be made on the prescribed forms. Such claims shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations. Each claim (except claims for refund of compensating tax—see article 401) shall be filed with the collector of internal revenue for the district wherein the claimant has his principal place of business. If the claimant has no principal place of business in the United States, the claim shall be filed with the collector of internal revenue located at Baltimore, Md. Copies of the prescribed forms may be obtained from any collector of internal revenue.

ART. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incum-

bent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

ART. 204. *Conditions as to tax burden with respect to amount of refund allowable.*—A refund may be allowed to the person who paid the tax, only of that amount paid as tax as to which the claimant establishes to the satisfaction of the Commissioner (1) that he bore the burden of such amount and has not been, or may not be, relieved thereof nor reimbursed therefor, and has not shifted such burden, directly or indirectly, through or by any of the means set forth in subsection (a) of section 902 of the Act; or (2) that he has repaid such amount unconditionally to his vendee who bore the burden thereof, as provided in subsection (b) of section 902 of the Act.

ART. 601. *Claim form prescribed.*—Claims for refunds of amounts paid as processing tax (as defined in section 913 (b) of the Act) shall be filed on P. T. Form 79. (See Chapter II of these regulations for general provisions relating to all claims.)

ART. 603. *Payment of tax.*—The claimant shall set forth in the claim complete data with respect to the amount of proc-

essing tax which he has paid on the processing of the commodity. Each claim shall show as to each month's processing of the commodity: (1) the total tax liability returned; (2) the total amount of tax paid on the first domestic processing of the commodity; (3) the date and amount of each payment and the month for which paid; (4) that part of the total amount paid which represented the processing of the commodity for a customer for a charge or fee ("custom processing tax," see Chapter V of these regulations); (5) that part of the total amount paid which represented processing tax, as defined in section 913 (b) of the Act; and (6) the collector to whom each payment was made. In the case of tobacco the above data respecting tax payment shall be shown separately with respect to each market classification.

ART. 605. *Evidence as to margins.*—Section 907 of the Act provides that in claims for refund of amounts paid as processing tax it shall be prima facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin per unit of such commodity was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

There shall be submitted with, and as a part of, each claim, a statement showing the average margin for the tax period and for the period before and after the tax. (For

definition of "tax period" and "period before and after the tax," see section 907 (c) of the Act.)

The average margin for the tax period shall be computed as follows: Determine for each month during the period (1) the gross sales value of articles derived from the commodity processed during such month; (2) the cost of the commodity processed during such month; (3) the amount of processing tax paid with respect to the quantity of the commodity processed during the month; and (4) the number of units of the commodity processed during the month. The sum of the monthly gross sales values for all months during the period minus the sum of the monthly costs of the commodity processed for all months during the period, minus the sum of the processing taxes paid for all months during the period, and divided by the sum of the number of units of the commodity processed during all the months comprising the period is the average margin for such period. (For definition of "cost of commodity" and "gross sales value," see section 907 (b), paragraphs (5) and (6), respectively, of the Act.)

The average margin for the period before and after the tax shall be computed in the same manner as the average margin for the tax period, except that the processing tax does not enter into the computation.

In determining the average margin for the tax period, the "number of units of the commodity processed" shall be the number of units of the commodity with respect to which the claimant actually paid the processing tax; the "cost of the commodity processed" shall be the cost of the number

of units of the commodity with respect to which the claimant actually paid the processing tax; the "gross sales value of articles" shall be the gross sales value of articles processed from the number of units of the commodity with respect to which the claimant actually paid the processing tax.

In support of such statement there shall be submitted, verified by appropriate affidavit, a detailed showing of the manner in which the margins for each month and the average margins for each period were ascertained, the data and records on which they were based, the location of such data and records, and all other related matters, including the accounting procedure of the claimant, which entered into the computations of such margins. All elements, factors, units, or measures entering into the computation of such margins, and any departure from uniformity in the use thereof in making such computation for any part of either period, must be fully explained and justified.

ART. 606. *Other evidence.*—In addition to the showing as to margins, the claimant is privileged to submit with his claim any other evidence available to him tending to establish that he bore the burden of the tax. Such evidence may be submitted to support the prima facie presumption, if such presumption is in favor of the claimant, or to rebut such presumption if it is against him. (See section 902 and subsection (e) of section 907 of the Act.)

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